



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE PLACE OF THE CODE OF HAMMURABI.

TO the present day, the studies of the famous code of Hammurabi have been made solely from the Semitic standpoint. One group of scholars has sought to find support for the contention that Hebrew civilisation was dependent upon the Babylonian from the very beginning; that it is in fact, but a certain logical development therefrom. The effort is conspicuous for its failure. An opposing school, influenced by traditional views of Hebrew history, strongly resents the suggestion that the Hebrew code should be for one moment considered or spoken of as upon so low a moral plane as the Babylonian. But such protest is even more futile than the above theory. No worthy end is attained, no useful purpose subserved, by insisting upon the unapproached superiority of the Hebrew and his code in their earlier years. The Hebrew records themselves do not make the claim, nor afford material for its support. The great Hebrew teachers assert that their people had received a peculiar training, which began when they were intellectually, morally, and socially in a very primitive condition. The final products of this historic training remain just what they ever have been, no matter what view be taken as to the origin of the people and the methods used in their instruction. The evidence is becoming preponderant, moreover, to indicate that the Hebrew organisation in its final shape owed much to Babylonia, if indeed it did not closely copy the ritual and religious organisation of the great Eastern center of law and religion. The value of Biblical teaching is in no wise assailed or impaired, even if such a possibility resolve itself into a fact.

We have a third theory, of which D. H. Müller, of Vienna,

may be considered the spokesman. It is frankly recognised that the differences between the codes of Palestine and Babylonia are more prominent than the resemblances: and it is suggested that we have before us sister-codes, so to speak: each being a regular development of certain principles of primitive Semitic social life. It is then maintained that we are in a position to determine what were the few elementary principles of primitive Semitic social and religious law.

But this view has the objection that the very elements that we might expect to be common to both codes, in case of such descent, are those which are notably missing from the Hebrew law, and constitute its supreme defects. We might expect minute and carefully detailed regulations concerning commerce and trade, rental, agriculture, etc., to be lost during any relapse to nomadic life, such as we find recorded in the case of the Hebrew. But why should the highly developed code of individual rights, of feminine independence, of equitable inheritance, of judicial organisation and procedure, be utterly lost by a people who had once been in southern Babylonia? May it not be that the Hebrew civil and secular code is simply Palestinian? that it is in its main features as Canaanitish as their language? The principles which the theory of common descent from an earlier code would give us reason to expect in the Hebrew code we do not find expressed in it. They had to be learned later, in some measure, from Babylonia. We must account these facts fatal to the theory.

It has long been suspected by students of anthropology that Semitic scholarship has allowed itself to be too much affected by the conception of the peculiar separateness of the Semitic race. The acknowledged presence and influence of animistic and totemistic elements in its religious development have served in some measure to obliterate the distinction, and to link the Semite religiously to the rest of mankind. Can any other position be safely assumed in the study of Semitic law? It is time to take another leaf out of Bastian. Does what is known as Semiticism represent an independent type of human development, something pre-eminently *sui generis*? Or is it only one of the necessary stages in human evolution, affected

by the peculiar local conditions in Arabia? Are we to find in the Semitic codes compared Ur-Semitic ideas, with Müller, or pre-Semitic ideas—principles latent in humanity and common to the race? Does the final highly developed code of Babylonia represent anything else than a certain stage of human progress?

There are those who are peculiarly restive under the suggestion that the evolution of man is so largely controlled by material factors as Buckle's view indicates. Ingersoll's dashing statement that "man is a machine into which we put what we call food, and get therefrom what we call thought" is sometimes selected as an expression of the principle, and assailed as hopelessly atheistic or materialistic. But is it? Without discussing the soundness of the statement, are we not still compelled to ask who made the machine, its food, and the environment and laws of its operation?

We may inquire then if the evidence of so-called Semitic law does not compel us to a monistic view of mankind, as the necessary correlate to a monistic conception of God. The influence of local environment does not conflict with the view, but supports it. And such monistic view of mankind the Hebrew literature asks us to accept. We may then compare the principles of the Hammurabi code with those of other bodies of legislation, to determine whether we should not explain it simply as a high development of man, embodying elements common to the race, and attaining a point possible only after long ages of social evolution.

One fundamental principle of all primitive law is retaliation. We cannot perceive any essential difference in this respect between the laws of the Semite and those of the Aryan, the central African, or the North American Indian. There is a mere impulse of the human animal to strike back when struck; the disposition to cherish the memory of an injury, and to avenge it at the first opportunity. There are no necessarily moral ideas in such behavior, nor can we fairly say there is a law in it, in the sense which we are considering.

The idea of law seems to begin in the establishment of a rude notion of proportion between an injury and the vengeance repaid. What we know of humanity does not suggest that this results from any reflection upon the abstract idea of justice. Primitive ven-

geance is noted for being entirely disproportionate to the original offense: and it remains so till a tolerably definite social order has become established. When necessity has extended the crude family idea to a body of men forming a clan, the impulse of the avenger is seriously hampered. He is compelled to consider what may be the result if he takes the whole matter into his own hands. Thus a rigidly applied *lex talionis* develops as a pure compromise between two opposing factions. The savage man would fain torture his enemy to death for a comparatively trivial injury. But the friends of this aggressor would have him go scot-free, if possible. The result of the contention is eventually to establish the law that the aggressor shall be treated just as his victim was. The one faction will allow no more, the opposing clan will accept no less. Thus a consuetudinary law becomes established with no necessary moral associations or impulses, with no other notion of justice than a rude sense of proportion between the two injuries inflicted. The abstract conception of justice, the purpose to work to some high end, must be regarded as a far off consequent, rather than as a cause, of the *lex talionis*.

How difficult it is to get beyond this stage and to reach abstract treatment, how very lame all effort to administer such a codal principle necessarily must be, is well illustrated by the story of the man who was haled into a Turkish court upon a charge of murder. He had fallen from an upper window upon a passer-by; thereby the latter was killed, though the former escaped unharmed. The dead man's son, as next of kin, took up the case: the court gave verdict in his favor. The son was to go to the same upper window: the accused was to stand beneath, and the son was to fall upon him and kill him. An American court might render such verdict as a bit of sarcasm upon a senseless suit. But there is no grim humor intended in the Oriental verdict.

The tale illustrates one point in the arrest of development of Oriental law, as contrasted with the more modern Aryan laws. A second difficulty in the application of such principle appears when the literal application of the *lex talionis* directly involves other parties in addition to the original plaintiff and defendant. In the code

of Hammurabi some trace of this difficulty remains, as in the case of the builder who erects a flimsy structure. Should its collapse occasion the death of son or daughter of the householder, the son or daughter of the builder must be put to death. But this stage is much beyond that of the early Hebrew, or of modern China, where the man is not viewed as an unrelated individual, but merely as the representative of a clan or family: and any grave misdeed of one may involve the destruction of the whole, as in the case of Achan. Or, the sons may be slain long after the father's death, to avenge an old grudge against the father, as in the case of Saul's sons. So in China to-day supposed treason involves the destruction of all male kin within the first degree: and in West Africa a man having a grudge against some member of a neighboring tribe kills the first member of that tribe whom he may meet: thus satisfying the grudge. It is the tribe, not the individual, that has wronged him. The correlate of this view is that the clan acknowledges the deed of a member as its own, and the effort to protect the wrongdoer may involve the destruction of the clan, as in the case of Gibeah of Benjamin, and of Jabesh-Gilead. But this stage is wholly past in the code of Hammurabi: clans have given way to the individuals, and the single law referred to is the only apparent trace remaining of overstepping the conception of purely individual responsibility for any given act. It is worth remembering, in this connection, that Ezekiel, the exile in Babylon, preaches to Israel the recent Deuteronomic law that no son should be punished for his father's misdeeds: "Ye shall no more use this proverb in Israel." "The soul that sinneth, it shall die," was the law of Babylon.

It may be recognised that the abandonment of such primitive principle was essential to the empire-building of the ancient Babylonians. We know that in the lower Euphrates valley cities sprang up ages before the ascendancy of Babylon: their relations to each other being much like those of the free cities of mediæval Germany, or the city-republics of Italy. Only a common body of law, something of a compromise, embodying some principles acceptable to each clan city, could fuse the group of individual competitors for the hegemony into a harmonious whole. The compilation of such

was the achievement of Hammurabi: and it is very clear that such consolidation was hardly possible till the idea of clan responsibility was practically abandoned for that of personal responsibility.

The code of Hammurabi has again passed beyond the Hebrew law, or indeed any other Semitic law, in modifying the *lex talionis* by recognition of the right of self-defense. The Hebrew code, even its latest form, recognises only accidental killing as constituting a ground for modification of the law; and the method is not one that would commend itself to Christian courts. It is to be noted, also, that murder is not dealt with by state courts: there is no state concerned in the matter. The whole thing is left really to private vengeance: and the man who in an altercation kills another in self-defense has no protection. The story of Abner, Joab, and Asahel serves to illustrate the matter. David has been criticised as weak in his dealing with Joab. This is beside the mark. David had no jurisdiction in the matter. A further step in the modification of the rigid law of retaliation may result from large commercial development, and the necessity of regarding a slave as a piece of property, upon which a pecuniary value is placed. Late Babylonian decisions may show the influence of this, and suggest a new meaning for "a life for a life." We have a case in which a man had been killed: whether accidentally or no, we cannot say, as the tablet is damaged. But the judges decide that he must make over to the family of his victim a certain valuable slave: otherwise he must be put to death on the grave of the slain. The great prominence given to the commercial value of a man in Babylon, with the everywhere apparent effort to make amends to all injured parties, suggest that we have not here a mere case of compounding a felony, but the effort to make amends to a family for the loss of a breadwinner by giving it another. In this point the Babylonian practice may have somewhat the advantage of modern codes, in that it endeavored to make amends at the only point where such was possible.

Yet this may have been the survival of a very ancient, and slightly different practice. Among the wild Arab tribes of the lower Euphrates protracted inter-clan feuds are to-day finally ad-

justed, after counting up the losses, by the payment, to the worsted clan, of two women for each man that it has lost above the number killed in the rival clan. A man is accounted more valuable than a woman, for the warlike purposes of peoples: further, the defeated clan needs more child-bearers, to repair its numerical losses. Very similar methods of settling clan feuds are reported from West Africa. The view taken of woman in tribal wars may recall to the reader the savage destruction of women in the earlier narratives of the Old Testament. And it is interesting to recall that Bellamy, in his *Looking Backward*, advocated the adjustment of all fluctuations in the working-strength of a nation, if produced by emigration, by reimbursing such nation for the loss of each efficient laborer. He may have been looking backward more really than he knew. Such early practice is one important root of slavery. The persons thus paid over generally become servants of the clan. But it is, on the other hand, proper to inquire if modern law, dealing only with moral and retributive aspects of murder cases, has not wholly omitted to consider the inevitable economic or commercial interests involved. The earlier law, whether Semitic or Aryan, seems to have tried to grapple with both.

The very large development of commercial law in Babylonia, and its influence in humanising the *lex talionis*, are indirectly supported by the prominence given to adoption. It became much more than a means of securing an heir for a childless family. It was an effective method of recruiting the powerful labor guilds that were so prominent a feature of the Babylonian social structure. Adoption was void if the child were not taught his adoptive father's trade. A commercial estimate of a man's value does not appear as modifying the *lex talionis* in murder cases, where men of different ranks were concerned; at least it does not appear in the code.

Now this question of rank is one of the largest factors in destroying the rude equity of the law of retaliation. The noble cannot meet the serf upon equal terms. An injury to one cannot be considered the equivalent of an injury to the other. Yet it need not always displace the method of compounding petty injuries, that has developed among men of equal rank. We observe this, in the case

of such, in the code of Hammurabi. The basis of estimation seems to be the cash value of the services of a first-class slave. From this standpoint the relative values of hand, foot, or eye, approximate those adopted by modern accident insurance companies. But in the case of slaves, only those salable or transferable are viewed as chattels. The man whose service is merely temporary, in order to cancel a debt, is legally a free man, and an injury to him must be treated from that standpoint.

The two principles of recognition of rank and of commercial compounding are naturally susceptible of great abuse. The former has produced the larger injustice in Aryan law and practice, owing to the more minute social subdivision. The commoner or burgher is above the serf or bondman; neither is held of any value in comparison with the knight or nobleman. In India the Brahmin eventually assumes the same unapproachable pre-eminence. The fearful oppression of the lower ranks, under such conditions, is a familiar tale. But Semitic society has not attained these sharply defined delimitations. Even the slave of to-day may be the prince of to-morrow. The one is not so inferior socially, the other not so pre-eminent, as in Aryan society. So in Babylonia industrial and intellectual efficiency seem to be recognised, whether in freeman or slave. We do not find the minutely graded officialdom so prominent in military Assyria. The institutions seem to be moulded in no small degree by the earlier Sumerian precedents. The judicial organisation rather suggests the Chinese civil service than the methods of other Semitic peoples. The powerful guilds, their apparent importance in the social structure, remind us of the guilds that arose similarly among the free Teutonic burghers of mediæval Europe, or the guilds and societies so important among modern Mongolian peoples. But legally there seem to be but two great classes in Babylonia, as in Central Africa: the chiefs or officials, and the freemen. A law is promulgated for the punishment of the man who injures one of higher rank than himself: the penalty is a public whipping. There is but one law, one penalty, one comparison of rank involved. While this elementary difference in rank works abuses in Semitic lands, it does not seem to have been re-

duced to a regular "Wehrgeld" scale, as among ancient Teutons and Hindus, according to which "every man has his price," at which he may be injured. On the other hand, the compounding idea has been the more abused among Semites and Africans: greed for petty gain overruling other considerations. A woman appealed to King Theodore of Abyssinia; her husband had been murdered; the offending soldier had escaped with a small fine. King Theodore summoned the judge and the soldier, heard the evidence, then asked the judge what penalty had been imposed. "Ten dollars fine," replied the judge. "Very cheap!" said Theodore: "I can afford that!" and drawing a pistol he shot the soldier dead, then laid down the ten dollars before the astonished judge, whose subsequent judicial conduct was more circumspect.

We have also applications of the *talio* to property questions. Two children are playing on the floor. One breaks the toy of the other and is promptly struck; or his toy may be broken; or if the injured child have a little more foresight, he will appropriate his playmate's toy to make good his loss. Practically the world has no other principles in all its laws, for the protection of property. Among children the compensation idea is usually the last to manifest itself, while the mere angry destruction of the other party's property is generally recognised as peculiarly childish; or, among men, as peculiarly savage. In law this method has never become recognised as a wise principle; and there is no legislation that punishes a man by burning his crops or maiming his beasts. Only where the property itself is a nuisance or source of peril does law generally demand its destruction, as in the case of a savage dog or unruly ox. The two largely used principles then are punishment inflicted upon the person of the offender, and the exaction of damages from him. In Aryan law the former principle is the more largely applied, though the very modern Aryan peoples do not now kill, burn, maim, or mutilate petty offenders against property rights so generally as they once did. In the Hammurabi code, on the other hand, restitution is the great principle almost everywhere applied. All sorts of failures to fulfill contracts, all sorts of petty thefts or attempts at fraud, seem regarded as creating petty debts, which stand against

the offender. The primal purpose seems always to restore to the injured property-owner all that he had been deprived of, with some compensation for his annoyance. Beyond this the code does not seem to go. There is no conception of a wrong to the dignity and peace of the state, of which we hear in our own formal indictments. In a single case we find maiming—that of the penniless fellow who is dependent upon the *kêpu* for the opportunity to raise a crop. If he steal any of the equipment entrusted him, he has no means of repayment, and personal injury is resorted to: he has his fingers cut off. The death penalty that appears in the early sections of the code in a case of disputed property, we must consider as really aimed at the perjury, not at the theft. The offense has been greatly aggravated: the false claim persisted in, and sworn to. The offender has violated the sanctity of the temple as much as he who has broken into it and robbed the gods. Each offender meets the same fate.

As in the case of the earlier *lex talio* for personal injuries, we cannot affirm that there are any necessary moral ideas in the conduct or impulses of the children used above for purposes of illustration. And the idea of restitution must be reached only after much discussion of the problem in clan life. It is not everywhere dominant in savage law: rather does it seem exceptional. In African law it is notably rare: mutilation, slavery, or death are the usual penalties. In the Hammurabi code, however, the religious feeling in regard to restitution is very strong. All losses or injuries must be attested by oath; and the gods are in this way given great prominence as the protectors of property.

The moral ideas of the people are much more definitely discernible in another direction. It is apparent to every one that a people who begin to regulate society by the application of a rigid *lex talionis* or restitution-principle will in time discover that the method has most pronounced limitations: that there are many of the most serious offenses to which the principle is totally inapplicable. That so many of these remain outside the provisions of all early codes may be taken as evidence that the *lex talionis* is, as we have suggested, the primal impulse of law: the offenses beyond its

powers are most probably recognised later, and in consequence of a considerable religious development. How far taboos are responsible for them we cannot discuss at this place. Suffice it to say that the cuneiform literature reveals to us a large number of offenses which immediately entail a species of taboo upon the offender. None may eat of his table, drink of his cup, or associate with him in any way, without being tainted thereby and subjected to similar excommunication. The banned person is shunned as if infected by the plague. We have the theory of the temporal rewards of evil-doing reduced to a minute and logical series of details. The person is solemnly declared accursed; or the curse is formally invoked upon him. Such a person, among primitive races, is "cut off from among his people." In the code we find this excommunication in the case of the person guilty of incest with his son's wife; and the same idea is really involved in the disinheritance of a son who has lain with his stepmother. The curse of Jacob upon Reuben is a direct application of the law of Hammurabi. Beyond these principles the code does not go: leaving to the domain of religion or to social discipline some offenses that are within the provisions of more modern secular codes. In this respect the Babylonian law is paralleled by the Hebrew, with its large list of accursed offenses. The Aryan law is in the same condition. The main difference is that the list of curses in the Hebrew code apparently antedates the largest ceremonial development, while in the Babylonian banning texts the list of ceremonial infractions involving excommunication for a longer or shorter period, is larger; and in Menu it is simply prodigious. We have relative stages of development thereby suggested.

But this method of punishing one's enemy, when the courts could not deal with the case, by pronouncing an excommunicative curse upon him, was capable of large abuse: and all early codes show the effort to limit it. In the code of Hammurabi, the imprecator must show that the case is one recognised as deserving a curse. In the early Aryan code, certain devices must not be used: apparently the effort is to stop the practice altogether. In the Hebrew code, curses may be invoked in the name of Yahveh; but there must not be invocation of the spirits of the dead, or strange divinities, or the

supposed spirits of evil. Such cursing is not in the name of Yahveh, and witchcraft is accordingly viewed as idolatry. A childlike confidence in the potency of such imprecations or incantations belongs to all branches of the human family: the practice is not, in any of its phases, purely Semitic. The witch is believed to have real power, and using it to slay or maim, is to all intents and purposes a murderer.

It is a fundamental principle of the code of Hammurabi that the presumption is always in favor of the innocence of the accused: the burden of proof is thrown upon the accuser. This but parallels the moderately developed judicial procedure of all peoples. But the fact that the laws are not yet conceived as expressing the will of a corporate body known as the state results in there being no such personage as a state's attorney to conduct the prosecution. Nor is there a royal prosecuting attorney: while Hammurabi is the actual compiler, he conceives the laws to be really from Shamash. There is no grand jury to find a true bill: no penitentiary representing outraged society; for while primitive society has really made the laws, it is not yet fully conscious of the fact and in consequence attributes to them a different origin. Not merely is the burden of proof upon the accuser, but in all primitive society the entire burden of accusation or indictment falls upon him. In this respect the legal procedure of Babylonia seems to have been that of all early nations. Even Aryan peoples have known no other till a relatively recent period.

It is very early apparent that under such a system the more plausible speaker may have too distinct an advantage in his presentation of his own case; and there is too much advantage with the popular favorite, in case the matter is argued before the popular assembly, as in ancient Greece or modern Africa. The balance of personal factors that was partially established in primitive society by control of the *lex talionis*, is seriously disturbed. Hence a delegated judicial body of some sort may appear very early; usually in the form of a council of the chiefs or elders, as among the North American Indians. It remains the essential feature of early Semitic

courts; it remains in Babylonia in a highly developed form, and is but slightly modified in the more advanced Aryan procedure.

But we find other things are needed to meet the difficulty and the idea of so framing the judicial administration that it may prevent crime rather than punish, seems to be attained very early. We may feel sure that this is one reason of the early development of the law in Babylonia, that every sort of transaction concerning which dispute might arise should be committed to writing. The court's task is largely reduced to the examination of documents: there is an insuperable barrier to forensic eloquence, and the plaintiff without documents, when they were possible, is unsuited. Possibly no other judicial system so thoroughly eliminated prejudice and passion. But we have no Babylonian oratory.

The conducting one's own case does not appear to have been superseded among the early Hebrews. We have not, however, the insistence upon carefully prepared and attested documents, which we find in Babylonia; but in the Babylonian Talmud they become prominent. In Greece, on the other hand, we find the paid attorney developing: but he is a product of the rights of the popular assembly; there is no delegation of popular authority to a senate, and any one may speak upon any case. This is also the practice of the African popular assembly. The sheer love of speechmaking, of intellectual combat, soon produced men whom litigants endeavored to retain, as champions of their interests. The Greek advocate was a great orator, rather than a technical, methodical lawyer. And there is no provision for the prevention of a wrong.

But in Rome the early inhabitants show the powerful clans or *gentes* collecting in a single city, with the same complaint of the *plebs* against the clan-lords that we find so frequently voiced in Israel. The assembly of clan-chiefs is soon modified by an elective system, and early experiences convince the Roman state that it would be better to thwart the oppressors of the *plebs*, than to punish them after the wrong was done. The situations in Rome, Babylon, and Palestine are closely parallel. Rome meets the situation by creating the great tribune of the people. His prohibitive authority is all but unlimited. His person is sacred, and made

so by the law. The great principle here established remains in our vetos and restraining injunctions. The Hebrew also had his great tribune of the people. But he had no legal standing. The elders, the primitive courts, had not recognised the necessity of his existence: the Babylonian document was unknown in this legal procedure: the only legislation upon his position eventually put him under the control of the formalists he had ever opposed, and placed no power whatever in his own hands. He was compelled, by the very nature of the case, to adopt the Greek method, to betake himself to public oratory: but to direct it to the Roman ideal: to the prevention of wrong. Hence his repeated protests in behalf of the plebeians are based upon purely moral and religious grounds. He must find, if possible, the conscience of the people; there was neither secular organisation, nor constitution, nor publicly posted code, to which he could appeal: he could quote no codal law for many of the evils he assailed, for legislation upon the subject did not exist, nor was there a legislative assembly through which he could secure such law. This "speaker" of the Hebrews is the *nab'î*. He is parallel to the Roman tribune in his battle against oppression. Each was a social necessity, as was the dispassionate appeal to records in Babylonia. As an immediately effective agency the Hebrew prophet was the least valuable, and his unorganised state went down soonest. As the creator of a public conscience essential to the perpetuity of the effectiveness of the systems of Rome and of Babylon, he is indispensable. Greece, with neither of the methods, soonest lost her political pre-eminence.

But the Roman lawyer really antedates the tribune of the people, though the latter is an expression of the principle from which the Roman lawyer grew. Cæsar, describing certain powerful Gallic clans, tells us that the clan chief held himself responsible for the protection of each member of the clan, which he thinks peculiar; yet it was the earlier Roman practice and survives to-day in the Italian *padrone*. But the worldwide custom of assembling the heads of *gentes* or clans to adjust differences quickly developed, after the founding of the Roman state, the principle of delegated authority; and this soon carried with it the growth of a body of men

skilled in the law, to whom the adjustment of all difficulties is delegated by the plaintiff and defendant.

Now at this point the Babylonian law shows some tendency to the delegate-principle. In later contracts we deal repeatedly with cases that but suggest the agent or client of a large firm, handling business by power of attorney. In reference to the method used to prevent fraud and diminish litigation, we should observe that the Babylonian law appeals at every stage to the religious impulses. A solemn oath binds all contracts. Parties to a suit in like manner bind themselves to accept the decision of the court: apparently a reminiscence of the purely advisory powers of the early *melek*, or sheik. In Aryan development we have the same thing, in the derivation of the "king": like the Semitic '*melek*', he was "the wise one," or "adviser." But while the religious obligation seems to have been powerful in Babylonia to the end, in Assyria there certainly was degeneracy. We have judicial decisions from the Sargonid period, which indicate that penalties solemnly invoked in an earlier age were actually undergone in the later age to induce a god or a court to release a man from his oath. The gross obscenity of certain late Assyrian oath formulæ points in the same direction: to a "bloody city, full of lies and robbery."

That the owner of any piece of property shall be held responsible for any mischief done by it is a generally recognised principle of law in all lands. The degree of such responsibility is much larger in the primitive stages of law than in the later era. Public sentiment in civilised lands would not sustain a verdict of murder in the first degree against the man whose vicious ox had gored some one to death, though it would demand heavy punishment. Measured by modern ideas, and the tendencies in such laws, we should decide that the Babylonian law was in this respect a stage in advance of the Hebrew.

This principle again is involved in the responsibility for trust funds and safe deposits. Here, however, limitations occur. The Babylonian trustee is held responsible for the keeping of his own house: and if the property of another man be stolen from his house, the loss falls upon the trustee. But on the other hand, if the

robbery take place upon the highway, the carrier, or agent, or peddler is blameless, and nothing can be collected from him. But in such case the loser may be indemnified by the city or magistrate within whose jurisdiction the robbery took place. Early Hebrew practice reversed this latter procedure. The elders of a settlement by a ceremonial observance repudiated all responsibility for a secret murder in their district: but the repudiation was, in reality, a species of admission, and merely illustrates the very primitive state of the administrative or police organisation. But the Babylonian official was required to keep the highways clear of robbers. The intra-mural requirements were perhaps not different. The robbed trustee was expected to pursue the thief and recover; however, it is hardly warrantable to assert that the burden of detection and arrest lay solely upon him. We may rather suppose that his method of recovery lay in reporting the loss to the city authorities. That the general public interested itself to a certain extent in such matters is illustrated in a letter in which two men report that a golden tablet which was stolen from a temple they have observed in the possession of a certain stone-cutter.

Now, this principle of clan-responsibility for deaths or injuries is familiar among all primitive peoples, and as an inter-clan principle has never ceased to be active: giving us to-day the principle of indemnities known to international law from time immemorial.

But as intra-national law, it has been a strong factor in empire-building, as in ancient Babylonia; clan cities being made to realise the necessity of a common code to eliminate constant internal friction. In the extent to which the responsibility is attached to the chief officer of the district, we have a suggestion of Sumerian or Mongolian origin: akin to the large application of the principle still known in China. The individual responsibility for dykes and levees is unique: in other ancient peoples the levee system seems public, or communal; and the principle of individual responsibility is not emphasised as in the Hammurabi code. But the laws concerning trust funds and deposits are not essentially different from those of other ancient codes.

Marriage seems viewed by the code purely as a civil institution.

Priests may have been prominent in the ceremony, but we do not know of them. The essential legal features are the carefully drawn documents, and the attestation of consent by representatives of both families. We have in the code and decisions a survival of the time when all marriages were arranged by the parents of the bride and groom. Their consent is still technically essential to marriage, though they cannot separate a young couple who unite in spite of them. We have decisions concerning cases where the parents of one or the other of the contracting parties complained that the marriage had been without their consent. The judges decide that the young woman must then wear the badge of a concubine, instead of that of a matron. But parental displeasure can go no further: and this state of affairs is terminated by the death of the objecting parent. The brothers of the stigmatised woman must formally recognise and endow their sister's marriage.

At this point then we may recognise a marked diminution of the ancient *patria potestas*: a compromise between the authority of the parents and the inclinations of the young people. After the first marriage there is no restraint upon the woman's freedom of action, save such as may be necessary to guard the property-rights of her children. She may marry where she will, none of the family having any legal right of protest; and the widow's authority in her own house certainly is above that of the widow in the Arab tribe in Mohammed's day, or in the days of Hebrew corruption when the prophets urged justice to the fatherless and widow; when all Hebrew codes put together had but four enactments concerning the rights of married women.

We may not be sure of the source or cause of this modification of parental powers. It cannot be due to primitive Semitic influences, for the early Hebrew recognises the right of life and death as vested in the parent. The father could sacrifice his son or daughter; he could offer the lives of his sons, as Judah did, as security for faithful fulfilment of a bargain. He could marry his daughter to whom he would; he could take his daughter, as Saul did, from her husband, and give her to another; he could sell his daughter, (Exodus xxi. 7,) as Rachel complained she was sold: both of which we have

seen that the angry Babylonian parent could not do. Even in Deuteronomy the power of life and death is reaffirmed, in the case of a troublesome son: the offended parent in Babylon could go no further than disinheritance: and even that step could not be taken without the consent of the court. The Talmud also recognises that a parent can legally take away his daughter, though it insists it should not be done: adopting practically the Babylonian law, while admitting Hebrew theory. So in ancient Roman law, the *patria potestas* was absolute. Virginius was perfectly within the law in slaying Virginia. So was the King of Moab in sacrificing his son: though like sentiments seem to have been aroused against Appius Claudius and Jehoshaphat. The Roman father also could take his daughter from her husband, as Saul did Michal; and this forced separation could be construed as legal divorce. So in the fragments of old Sumerian legislation we find this same paternal power: the father could sell his son as a slave, and seems to have had the right to put him to death as well. The same law remains in China still, cases being common enough. The prevalence of infanticide among the heathen Arabians cannot be certainly construed as mere *patria potestas*, for it was offset by the practice of killing the aged and feeble. On the other hand, the Greek parent does not appear to have had such absolute powers; nor do we certainly recognise it in primitive Aryan laws. This rigid principle may then have been Mongolian in origin. The Etruscans and Sumerians are alike suspected to be Mongols; and Etruscan domination certainly affected early Roman institutions. We might thus explain the sterner laws of both regions, in their earlier years; but the humanisation of the code of Hammurabi we must evidently consider to be a result of the general development of civilisation and public sentiment, rather than of peculiarly Semitic ideas.

Neither the code nor any other Babylonian remains at present show us any trace of the levirate marriage. This was well known to the early Romans, and to the early laws of the Aryans; it remains even in Menu. It is familiar in the Hebrew records, even in the time of Tobit; it is provided for in Deuteronomy. If we regard it as a relic of polyandry, we shall be compelled to admit the

Sumerian had developed very highly, to eliminate an institution so familiar to the primitive Mongol, and so prominent in Thibet to this day. If the idea is merely that of abandoning one clan for another, we may understand its loss is due to the displacement of blood-clans by labor-clans. The great guilds of Babylonia have displaced the old social divisions based upon kinship. Such industrial development would logically eliminate the levirate; a widow would marry then within her guild.

Divorce is far less easy in the code than in the Koran, or in the Hebrew codes. There is no opportunity for divorce at the mere whim of the man, by a mere verbal dismissal. Courts are in charge, and charges must be investigated. But among the heathen Arabians, the utmost laxity prevailed. Mohammed's law to control the abuses is rather ludicrous. As the same woman was often divorced and remarried by her whimsical husband, the curious measure was adopted that such husband could not reclaim his wife till she had first been married to another man: precisely the reverse of the Deuteronomic law (xxiv. 1-4). The Deuteronomic law provides for a written certificate; the patriarchal law, like the Roman, did not require such. But the Chinese law has from extremely ancient times demanded that a husband give the parents of his divorced wife a written statement of the reasons for the divorce: which document may become the basis of legal procedures. And such legal procedures, with forfeits of property, were inevitable in Babylonia.

The Babylonian Talmud considers that a marriage is legal and binding when the contracts are drawn up. In the earlier times of the Hebrew people we do not find this; and the rabbins who have held this up as an evidence of the superior character of the Hebrew law have simply been innocent of any remembrance of the land whence they derived it.

Though the formal bonds and contracts were essential to the full title of wife or matron in Babylonia, children were regarded as an end of marriage; and the fruitless marriage might be amended in various ways. But barrenness constituted no ground for divorce. Penalty for unreasonable divorce, seven years' earnings for a skilled laborer, was so heavy as to render divorce impossible to the masses.

There was far more latitude in ancient Rome and Greece as among ancient Semites; though as a practice the earlier Romans had a horror of divorce. Spurius Cavilius Ruga, A. U. C. 523, has been asserted to be the first Roman who formally divorced his wife; but the practice was disgracefully common in the days of Rome's luxury. Nor was there in the Babylonian husband's hands the supreme power that was granted to the Roman husband. The tradition has been left that Roman wives were accustomed to absent themselves from home three days in the year, as a precaution; one year's continuous residence under the husband's roof transferring to him the power of life and death formerly held by the father. In primitive Aryan law we seem to miss this masculine domination: it develops later under Brahminism. Woman's position was apparently higher with the early Aryas than at many later periods. We may consider that there was degeneracy even in Europe, till the rise of feudalism and the development of the standards of chivalry. In the Homeric songs woman is the prize of war as completely as among the later nomad Semites. In widowhood especially woman's position through all the East became one of peculiar hardships. But in all these less advanced social systems, as with the higher Babylonian, there is one common feature: the man marries the woman, divorces the woman. She does not take a husband, nor divorce one. She merely compels the man to grant her a divorce. The *sadiqa* marriage lies far back of the era of Hammurabi.

Very striking is the high rank accorded to the agriculturist, in the Babylonian social system. This is certainly non-Semitic: the high place of the farmer dates from old Sumerian days. Literati develop their standing later. Mechanics rank after the farmer; merchants lower still. In the Hammurabi code, we may observe in the wage scale that the highest wages are those of the first-class farm laborer, though the code dates from the days of the pastoral Semites. In the list of officials, K.4395, the merchant still ranks below the gardener. This is the more striking in that it comes from the Sargonid age, when the Babylonian merchant had made the city famed for centuries throughout the world. Even the kings of the pre-Semitic age seemed to rejoice in the title "servant of Adar,"

(the god of agriculture,) or "farmer." In far later times the "Farmer Prince" or "Great Farmer" is the title of a great official; and it seems to have been borne occasionally by the king himself. Semitic kings, however, preferred the title of "Faithful Shepherd": thus perpetuating the tradition of their pastoral origin. In this actual collision of two modes of life we may perceive an historic basis for the tradition of Cain and Abel. We may compare with these facts the title of the Hindu Prince, the *Gai-kwar* or "Cowherd" of Baroda. But we are most forcibly reminded of the high rank theoretically accorded to the farmer in China, and of the fact that the "Son of Heaven" must there guide a plough around a field with his own hands, to emphasise the high place of agriculture. The secondary position of the Chinese merchant, with his painstaking, methodical honesty, also forcibly remind us of the great city of the ancient East, with its great early development of commercial supremacy. All this commercial law, like the position of the agriculturist, seems to have been fully developed ere the political dominion of the Semite. Such is the legitimate inference from the habitual use of the Sumerian in the critical phrases of early Semitic contracts.

Edwin Markham has drawn us the picture of the "Man with the Hoe" in all the ancient world. We may observe its marked contrast with the social position of the Babylonian farmer. We cannot then find any trace of Ur-Semitic affinities in this ancient land. The law is not only unlike the Hebrew, and his gradual pauperisation of the wretched Canaanite tiller of the soil; it is still more unlike the system of the nomadic Arab shepherd patriarchs. Not only is the farmer awarded the highest place in the industrial world, but the debtor-laws give him the largest possible protection. We may contrast Egypt, where the wretched fellah has ever been what he still is. Amenemun writes to Pentaour, court poet of Rameses II: "Have you ever represented to yourself the state of the rustic who tills the ground? Before he has put sickle to the crop, the locusts have blasted part of it; then come the rats and the birds. If he is slack in housing his grain, the thieves are upon him. His horse dies of weariness as it drags the wain. Anon the tax-gatherer arrives; his agents are armed with clubs; he has negroes with him

who carry whips of palm branches. They all cry, 'Give us your grain,' and he has no easy way of avoiding their extortionate demands. Next the wretch is caught, bound, and sent off to work without wage at the canals; his wife is taken and chained, his children are stripped and plundered." In the *Praise of Learning* we read, "The little laborer having a field, passes his life among rustics; he is worn down for vines and pigs, to make his kitchen of what his fields have; his clothes are heavy with their weight; he is bound as a forced laborer; if he goes forth into the open air he suffers, having to quit his warm fireplace; he is bastinadoed with a stick upon the legs, and seeks to save himself: but shut against him is the hall of every house; locked are all the chambers." Such was Egyptian bondage.

We need not detail the situation of the wretched field laborer, or serf, during the Middle Ages. The parallel is plain to all. It is clear that we cannot find the Babylonian system paralleled among the highly developed Aryans, even though their name signify "ploughmen," till we reach the most democratic of modern nations. From the agriculturist's view-point, America might most nearly stand for the modern equivalent of Babylon.

As has been previously remarked, a chief excellence of the law of Babylon was its thorough protection of the debtor. We have as yet nothing to equal Hammurabi's safeguarding of his rights in any other ancient code. His situation was decidedly better than under many modern systems. As compared with the Hebrew, the Babylonian code is immeasurably superior. No claim could be pressed against the debtor without documentary proof. The right of levying upon him or of attaching his property without his consent was not granted. Risks on crops were divided. The failure of a crop or its destruction by floods when the rental contract gave the landlord a share in the crop, or when a loan in cash was made to a struggling farmer, did not mean that the loss would fall solely upon the debtor. In the case of renting on shares, the landlord was held to the letter of the contract: he got nothing. In the case of the loan, interest due for that year was cancelled, and the time extended a year. If a loan had been made secured by a lien on the

crop, the handling of the harvested grain was not permitted the creditor. Nor could he take advantage of the debtor's straits and secure bargains by forcing a sale of the debtor's property for a fraction of its value and buying it in. The crop conditions were carefully noted each year, and the standard price for the season, "the king's price," was publicly posted everywhere. Any creditor taking a part of the crop for his debt took it at "king's price." Nor could the creditor help himself from corn in field or in store. The principle of exemption was known. The work-ox of a peasant could not be levied upon: he must not be rendered unable to till his land.

Every reader of the Old Testament recognises how all this contrasts with the Hebrew law, and with Hebrew practice as criticised by the prophets. The Hebrew creditor could take everything from the struggling peasant, save his coat. No laws existed, restricting the powers of the creditor, or thwarting his rapacity. In an instant the wretched debtor could be seized for the pettiest claim; the price of a pair of flimsy sandals, and sold into life-long servitude. Worse still, he might raise a family while in such servitude: the children, because of their father's need of a pair of sandals in the remote past, are perpetual slaves. Not even in the grave could the debtor rest. He might have been the greatest prophet of his time, yet if he died owing a petty debt, he might be sure his relentless creditor could seize his children and sell them as slaves. We have the record of a prophet's distressed widow appealing to Elisha under just such circumstances. Even as late as Nehemiah's time, poor Jews who wished to help in the rebuilding of the city were compelled eventually to sell themselves, their families, and all their belongings, for a bare sustenance. An old claim could be revived, and a freed bondsman re-enslaved: no law forbade. This infuriated Jeremiah.

All this was impossible in Babylonia. From her Israel could have learned all that she most needed to learn. The Babylonian debtor, as already stated, had the line of exemption clearly drawn; and the claim of the creditor was confined to the estate and person of the debtor. The latter might hire out a member of his family to work on account of some debt, but this could not be for longer

than three years. Even if he were himself reduced to servitude, it did not enslave his children, nor make a slave of his wife, nor prevent his marriage with a free woman. If he were capable he might enter business upon his own account, merely handing over to his master annual interest on the amount invested in him. His wife retains her freedom, and takes one-half of their jointly acquired property for herself and the children. No claim can be made upon the latter by the creditor-master. An account once closed could not be reopened; the fine for such attempt was from three to sixfold the amount claimed.

We may add also the condition of the Aryan peasant: the law holds him for the debts of his ancestors, as the Hebrew law did; and the Hindu to-day may be born hopelessly in debt for the expenses of his grandfather's wedding; and the enormous rates of interest will result in his paying upon the claim all his life, only to bequeath a still heavier debt to his children. We must grasp all this in order to appreciate the full import of the previously mentioned new law of Deuteronomy and Ezekiel, the close student of Babylon: the son should no longer be punished for the father. "Ye shall no more use this proverb in Israel!"

We do not at present know of any effort to regulate rates of interest in the code: though such sections may have existed in the portion now defaced. The same is true with regard to rental rates. These are referred to in the code as familiar, in the case of agriculture and horticulture; but we cannot say whether they were controlled by law or not. In the code the crop-rent percentage is identical with that customary in America to-day. But as to interest, the large number of contracts showing considerable loans for a short period, with the stipulation that there should be no interest unless the sum was not repaid by a certain date: the sum to draw interest thereafter—these suggest that interest was originally regarded in the nature of a penalty for tardiness. Especially does this seem to be the case where the contracts so often say, "if he does not pay by a certain time he shall add one-fourth to it," without reference to the amount of time that elapses after the money is due. As the contracts between merchant and peddler merely indicate a division

of profits as the final basis of settlement, it is possible that a certain sentiment may have existed against interest or usury. Certainly the rates remained high—twenty to twenty-five per cent. usually, for 2000 years. We do find efforts to regulate the labor and transportation problems, by a fixed scale of prices: and we know in later times of royal efforts to regulate the prices of necessities by the “king’s price,” that there might be no extortion, or “cornering” the market. The effort most nearly resembling this in other lands we should find in the Roman fixing of a commutation price upon certain staples, in case a tributary wished to pay taxes in produce instead of cash. But the transportation tariff is fixed in Babylonia on a chartering basis; supposing a man to hire a vessel by the day. The intricacies of the per-ton per-mile schedule had not found place at the earlier period, though the general question of such expense must have been carefully estimated: for we find in later contracts choice allowed a debtor. He may pay a certain quantity of ripe dates in his orchard at one time, or, F. O. B. at Nippur or Babylon, during the next month, a much smaller quantity; or a still smaller quantity if delivered later at Susa. The details of commercial fluctuation, transportation, and local valuation seem then perfectly understood, and contracts embodying such calculations are made months ahead. We know of no necessity for an inter-state commerce law, though the length of the life and the ramifications of great business houses give reason to suspect that the later Babylonians eventually had the trust problem before them. But it certainly did not exist in the times of Hammurabi: the loans of that period are notably minute, as compared with those in Persian times; and the trust problem must have grown from the powerful guilds or wealthy clans. In all this field we are practically without Hebrew legislation, but with much prophetic preaching.

We can not observe in the code, in the disposition of property, anything that answers precisely to a will, in our sense. The apparent suggestion is that if there are any special dispositions of property, the recipient must be put in possession by the donor in his lifetime. This would preclude the possibility of forgery, imposture, or pleas of mental incapacity in regard to wills. But where special

gifts are not made, by either parent—as they may be—, there seems no right of primogeniture recognised. In this we have a fundamental difference from Hebrew law, and from pure Semitic law in general, so far as we know it. But from the various banning texts we learn that an elder brother or elder sister ranked next to the parents in the matter of reverence and respect required; and a deficiency in such respect entails a heavy *kišpu* or ban upon the delinquent. This feature again reminds us strongly of Mongolian—of Chinese standards. In early Aryan law we find a degree of uncertainty concerning the proper apportionment of property, though the elder brother seems to be regarded as the head of the undivided family; but this very uncertainty is so inherent from the beginning that all Aryan systems of a later time, varied as they are, can claim to have something in common with the primitive stage. And in such division of goods in Babylonia the daughters must share: their portion taking the form of dowry at marriage; if not married, a daughter obtains a son's share. This again does not seem to be the early state of Semitic law, and certainly is not the law of the Koran. In that age, in any circumstances, whether as witnesses or as sharers of an estate, two women were assumed to be the equivalent of one man. A woman's property in Babylonia could not be claimed by her husband at her death, in which respect the code is decidedly in advance of the Koran legislation; we are not so clear as to the early Hebrew practice at this point. In case of death without children, whatever property was held reverted to the respective families that had endowed the marriage in the beginning; but property independently acquired was bestowed at the woman's pleasure. In this detail again we find the Sumero-Semitic practice superior to any other ancient code, and to most modern codes. We can hardly esteem this to be Semitic law.

This comparative sketch of legal principles is hardly complete without a statement of one fundamental difference between all Semitic law and all modern Aryan law, of which the Romans are recognised as the founders. We can then understand the more clearly the real failure of the Semite to influence Western law in

any essential: a failure the more marked when we reflect upon his dominance in religion.

Already has been mentioned the fact that the Semite does not possess the abstract conception of the state, or of society, in the sense in which we use the words in connection with law. He has not formed the habit of thinking in abstract terms. Law is to him, as to all Oriental peoples, the expression of a personal will, a personal authority. We cannot conceive a Semite setting up abstract principles of justice and proceeding to assail the very gods with them, as Æschylus or Euripides could do. If the god or king decreed a thing, that was law and right, for the ordinary Semite, though it might be really distasteful to him. The king of the land, the gods of the land,—these were also the law of the land. What was right in Moab might be wrong for the same case in Aram. Decisions might be diametrically opposed in the two lands, and pronounced just in each, as expressing in each the personal will from which all local law came.

The Roman mind could shake off such limitations, and generalise, and think more abstractly. It could readily recognise some general principles or sentiments operant in each province or people, irrespective of race, or creed, or social organisation. Its lawyers soon grasped the idea of a *jus gentium*, contained in the summary *Quod semper, quod ab omnibus, quod ubique*. The Greek dared to storm heaven itself with such a weapon. But where he would have advanced upon the past by openly assailing Zeus, the Hebrew prophet would have said that the masses did not really know Zeus. The Roman reached a system of universal law by eliminating personality, creeds, and local interests and prejudices; producing an abstract, unyielding, inerrant justice. This the Semite could not do: unable to separate law from personal will, he could create a world-system of law only by the extension of one personal will to all the world, to all the universe. And relation to this becomes not law, in the jurist's sense, but religion. We may understand then why the laws of Hammurabi are given by Shamash, the Sun God, the All-seeing Eye, God of Justice, as those of Moses are given by Yahveh. The codes have developed alike, the same explanation is

offered by the lawyers and codifiers for each. They know no other explanation for law. This is to be remembered in discussing the problems of inspiration.

We must take one step further: the peculiarity mentioned is not a trait found in the Semite alone, though he has given it the highest development. This conception of law as the expression of some personal will is just as much a peculiarity of the Filipino or the Polynesian. It is seemingly common to mankind in earlier stages: it but marks the period when impersonal abstract thought is not yet possible. There is at last a parting of the ways, and necessarily so. No satisfactory secular law and judicial system can be established so long as every perplexity means that men must consult the oracle of The Personal Will, instead of thinking: just as no satisfactory religion can be established by banishing a personality and dealing in intellectual abstractions. Law and religion but represent two stages, two branches, two modes of thinking upon the same problems. And thus we may conclude that the code of Hammurabi belongs not peculiarly to the history of the Semite, but to the history of man; and that it represents the highest secular law attained by way of the earlier method of defining and expanding law.

A. H. GODBEY.

UNIVERSITY OF CHICAGO.